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Interpreting retained EU private law post-Brexit: Can Commonwealth comparisons help us determine the future relevance of CJEU case-law?

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Abstract: In June 2016, the UK voted in a referendum to leave the European Union. The consequences of Brexit are wide-ranging, but, from a legal perspective, it will entail the repeal of the European Communities Act 1972. The UK government does not intend to repeal EU law which is in existence on exit day, but, in terms of the interpretation of retained law, decisions of the Court of Justice of the European Union (CJEU) will no longer be binding after Brexit (subject to any agreed transition period). Nevertheless, section 6(2) of the European Union (Withdrawal) Act 2018 does allow the UK courts to continue to pay regard to EU law and decisions of the CJEU “so far as it is relevant to any matter before the court”. This paper will consider the meaning of the phrase “may have regard to anything ... so far as it is *relevant*”. In empowering the courts to consider post-Brexit CJEU authority subject to the undefined criterion of relevancy, to what extent is this power likely to be exercised? A comparison will be drawn with the treatment of Privy Council and the UK case-law in Commonwealth courts following the abolition of the right of appeal to the Privy Council, with particular reference to the example of Australia. It will be argued that guidance may be obtained from the common law legal family which can help us determine the future relevance of CJEU case-law in the interpretation of retained EU private law.

1. Introduction

On 23rd June 2016, 51.9% of voters in the United Kingdom voted for the UK to leave the European Union after 43 years of membership.¹ In March 2017, the European Union (Notification of Withdrawal) Act 2017 permitted the UK Prime Minister to notify, under Art 50(2) of the Treaty on European Union, the UK’s intention to withdraw from the EU. Art 50(3) provides for termination of EU membership “from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification.”² The Prime Minister notified the Council of the UK’s intention to leave the EU on 29 March 2017.³ The European Union (Withdrawal) Act 2018, which received Royal Assent on 26 June 2018, provides that the European Communities Act 1972 will be repealed on exit day.⁴ Subject then to any agreed transition or implementation period, ultimately sections 2(4) and 3(1) of the 1972 Act, which give effect to the doctrine of the supremacy of EU law over national law, will be repealed.⁵ While the Act provides that EU-derived domestic legislation (e.g. that implementing EU Directives) which is in effect in domestic law immediately before exit day will continue to have effect on and after exit day,⁶ and that direct EU legislation (e.g. Regulations) will form part of

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¹ The United Kingdom officially joined the then European Economic Community on 1 January 1973.

² Provision is made, however, for the European Council, in agreement with the Member State concerned, to unanimously decide to extend this period.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf (accessed 12 November 2018).

⁴ s.1. Sched.1, para 4 also provides that State liability for breach of EU law under Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357 will no longer apply on or after exit day.

⁵ Case 6/64 *Costa v E.N.E.L* [1964] ECR 1141; KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (OUP, 2003); A. Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004).

⁶ s. 2(1). EU-derived domestic legislation is defined at s.2(2).

domestic law on and after exit day,⁷ it will be the UK court system alone which will interpret the retained EU case law.⁸

This paper will examine the implications of these momentous political developments for English private law.⁹ While matters such as free movement of goods and people and issues regarding the UK's external relations may be the most obvious issues arising from leaving of the European Union,¹⁰ European Union law has also had an important impact on private law.¹¹ Twigg-Flesner has highlighted the great diversity of instruments which have changed national contract law, be it commercial or consumer law.¹² The Consumer Rights Directive 2011/83/EU,¹³ for example, provides a single set of core rules for distance and off-premises contracts, strengthens consumer protection by introducing stricter pre-contractual information requirements and a uniform right of withdrawal period, and offers targeted protection on specific issues e.g. retailers are no longer permitted to charge more than actual costs for use of credit cards or any other method of payment, or hotlines. The Directive, implemented by both primary and secondary legislation,¹⁴ reflects the dual purposes of EU consumer law: to achieve a high level of consumer protection across the EU and to contribute to the proper functioning of the internal market.¹⁵ The same, to a lesser extent, may be said for the law of tort.¹⁶ The Product Liability Directive 1985/374/EEC,¹⁷ for example, implemented by Part 1 of the Consumer Protection Act 1987, is ambitious in imposing strict liability on manufacturers for

⁷ s. 3(1).

⁸ "Retained EU case law" means any principles laid down by, and any decisions of, the European Court of Justice as they have effect in EU law immediately before exit day (subject to other provisions of the Act): s.6(7). The duty of consistent interpretation (that domestic law must be interpreted, as far as possible, in accordance with EU law) will be maintained, however, in respect of pre-exit domestic legislation: s.6(3).

⁹ For reasons of space, the article will focus on contract and tort law and will not examine unjust enrichment, although EU law has had some impact here, notably in relation to overpaid tax and VAT: see R Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (Hart Publishing, 2010); S Elliott, B Häcker and C Mitchell (eds), *Restitution of Overpaid Tax* (Hart Publishing, 2013) ch 1.

¹⁰ See, for example, M. Dougan (ed), *The UK after Brexit: Legal and Policy Challenges* (Intersentia, 2017); F. Fabbrini (ed), *The Law & Politics of Brexit* (OUP, 2017); A. Biondi, P.J. Birkinshaw and M. Kendrick, *Brexit: The Legal Implications* (Wolters Kluwer, 2018) and special editions of journals including (2016) 27(3) *King's Law Journal*: 'Brexit means Brexit: but what does Brexit mean?'.
¹¹ See, for example, J. Devenney and M. Kenny (eds), *The Transformation of European Private Law: Harmonisation, Consolidation, Codification or Chaos?* (CUP, 2013); C. Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010).

¹² C. Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar Publishing 2016); C. Twigg-Flesner, *The Europeanisation of Contract Law* (2nd ed., Routledge, 2015).

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, *OJ L 304*, 22.11.2011, p. 64–88.

¹⁴ Transposed into UK law by the Payment Surcharges Regulations SI 2012/3110, Consumer Contracts Regulations (Information, Cancellation and Additional Charges) Regulations SI 2013/3134, and Consumer Rights Act 2015.

¹⁵ H. Schulte-Nolke and L. Tichy (eds), *Perspectives for European Consumer Law: Towards a Directive on Consumer Rights and Beyond* (Sellier, 2009); E. Hall, G. Howells and J. Watson, 'The Consumer Rights Directive - an assessment of its contribution to the development of European consumer contract law' (2012) 8 *E.R.C.L.* 139-166.

¹⁶ P. Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar Publishing, 2017); C. van Dam, *European Tort Law* (2nd ed., OUP, 2013), C. von Bar, *The Common European Law of Torts* vols 1 and 2 (OUP, 1998 and 2000); M. Bussani, M. Infantino and F. Werro, 'The common core sound: short notes on themes, harmonies and disharmonies in European tort law' (2009) 20 *K.L.J.* 239.

¹⁷ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products *OJ L 210*, 7.8.1985, pp. 29–33.

defective products which ensures (at least in theory) a uniform level of consumer protection across the European Union.¹⁸

The EU (Withdrawal) Act 2018 provides that these sources will remain part of UK law, but without any future binding interpretative guidance from the Court of Justice of the European Union (CJEU). A court may still have regard to anything done on or after exit day by the European Court, another EU entity or the EU but only *so far as it is relevant to any matter before the court*.¹⁹ Section 6 of the 2018 Act makes this clear:

- (1) A court or tribunal— (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day.
- (2) Subject to this and subsections (3) to (6), a court or tribunal *may* have regard to anything done on or after exit day by the European Court, another EU entity or the EU *so far as it is relevant to any matter before the court or tribunal*.
- (3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it— (a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before exit day, of EU competences.²⁰

The Explanatory Notes to the Act merely repeat that while a court may have regard to post-exit CJEU decisions, it cannot have regard to such an extent it considers itself bound by them.²¹ The Government anticipates that changes will be made to retained EU law by Parliament and the Supreme Court²² as and when deemed appropriate.

The ambiguous wording of s.6(2) leaves open the question *when* reference to post-exit EU law and, more specifically, decisions of the CJEU will be deemed “relevant” by the UK courts.²³ Where legislation or case-law is based on EU sources (directives, regulations etc), will the UK courts continue to refer to future decisions of the CJEU as a specialist court dealing with EU law? If so, how persuasive will any such decisions be to the future shaping of UK law? As seen above, UK contract, tort, and specifically consumer law have been subject to a number of legislative instruments since 1973 which will be retained after Brexit. What factors, then, will determine the relevance and persuasiveness of these sources?

To answer this question, this paper will engage in a comparison with the practice of Commonwealth courts following the decision to end the jurisdiction of the Judicial Committee of the Privy Council (JCPC). While this renders the case-law of the JCPC solely of persuasive

¹⁸ See D. Fairgrieve and R.S. Goldberg, *Product Liability* (3rd ed., OUP, 2018); S. Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP, 2005); D. Fairgrieve and G. Howells, ‘Rethinking product liability: a missing element in the European Commission’s third review of the Product Liability Directive’ (2007) 70 M.L.R. 962.

¹⁹ s.6(5) adds that, in deciding whether to depart from any retained EU case law, the UK Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law.

²⁰ Emphasis added. s.6(6) provides that “Subsection (3) does not prevent the validity, meaning or effect of any retained EU law which has been modified on or after exit day from being decided as provided for in that subsection if doing so is consistent with the intention of the modifications.”

²¹ Explanatory Notes to the EU (Withdrawal) Act 2018, paras 109-117.

²² *Ibid.*, para 113 which clarifies that after exit day, retained CJEU case law will have the same binding, or precedent, status in domestic courts and tribunals as existing decisions of the UKSC or the High Court of Justiciary.

²³ It is a matter over which senior judges have expressed concern, see C. Coleman, ‘UK judges need clarity about Brexit – Lord Neuberger’ BBC News 8 August 2017. Lord Neuberger was President of the Supreme Court of the United Kingdom from 2012 to 2017.

authority, as we shall see, common law jurisdictions have continued to make reference to such case-law to the present day. What factors, then, determine the continuing relevance and persuasiveness of such sources? For reasons of space I will focus primarily on one jurisdiction, Australia, although reference will be made to other jurisdictions. This is chosen for three reasons. First because the right to appeal to the Privy Council was abolished in 1986 (a period which gives time for reflection but is recent enough not to be dismissed as historically-dated). Secondly, it is a jurisdiction where the courts and judges have clearly articulated their approach to the use of persuasive authority and there is citation data analysing the approaches of the courts. Thirdly, like the EU, it is a jurisdiction with which the UK has long-standing trading relations and historical ties, but involves a relationship not without its tensions, typified by the debate concerning the Australian flag.²⁴ Examining the practice of the Australian courts does not provide an exact comparator to Brexit, but, in the face of uncertainty, it is submitted that a comparative study is capable of highlighting factors which are likely to determine to what extent the courts will continue to find CJEU case-law relevant and persuasive post-Brexit.

2. Leaving the EU and abolishing the right of appeal to the JCPC – a valid comparison?

This article is about departure and how a legal system should treat decisions of a court whose judgments were previously binding but, for political reasons, are now rendered solely of persuasive authority. For Commonwealth States, parallels may be found with the decision to abolish the right of appeal to the Judicial Committee of the Privy Council (JCPC). The reasons for departure from the JCPC have varied from the overtly political (notably a backlash against neo-colonialism and ‘White dominium’) to the practical. Keith, for example, has argued that growing differences between Commonwealth States provided a significant reason for states to end the appeal to the JCPC.²⁵ The reputation of the JCPC has also varied over time among professional and academic lawyers.²⁶ Finn has commented that “the real Achilles heel of the common law of England ... was its parochialism”, in other words its narrow-minded pursuit of policies which paid little attention to the needs of individual States.²⁷ The role of the JCPC (like the CJEU) is to produce uniformity across states, guiding other jurisdictions, as a specialist court, how to interpret the “common” law. Established as the British Empire’s Court of Final Appeal in 1833 dealing with appeals from colonies from a mixture of legal traditions and different distributions of wealth and climates,²⁸ it was never seen as a national court, but

²⁴ See *Guardian Australia*, ‘Malcolm Turnbull says Australian flag will never change, rejecting new design’ January 26 2018.

²⁵ K.J. Keith, ‘The unity of the common law and the ending of appeals to the Privy Council’ (2005) 54 I.C.L.Q. 197.

²⁶ G. Sawyer, ‘Appeals to the Privy Council – Australia’ (1970) 2 Otago L Rev 138 at 144. For criticism of the ongoing right to appeal, see also B.J. Cameron, ‘Appeals to the Privy Council – New Zealand’ (1970) 2 Otago L Rev 138 at 172.

²⁷ P. Finn, ‘Unity, the divergence: The Privy Council, the common law of England and the common laws of Canada, Australia and New Zealand’ in A. Robertson and M. Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart, 2016) 45.

²⁸ Judicial Committee Acts 1833 and 1844. Under the Appellate Jurisdiction Act 1876, the Law Lords became the permanent judges of the court. Today, all Privy Counsellors who hold or have held high judicial office in the United Kingdom, or have been judges of superior courts of certain Commonwealth countries, are eligible to sit if they are under 75 years of age. See, generally, Lord Neuberger, ‘The Judicial Committee of the Privy Council in the 21st century’ (2014) 3 CJICL 30 and Lord Mance and J. Turner, *Privy Council Practice* (OUP, 2017). The historical background to the Privy Council may be found in Mance and Turner at paras.1.05-1.32.

as the head of the judicial system of every British possession outside the United Kingdom.²⁹ In the early part of the twentieth century, the JCPC was the highest appellate court for around a quarter of the world's population (including Canada, Australia, New Zealand India and parts of Africa).³⁰ This required, as Mitchell notes, “sophisticated and sensitive decisions”, needing both technical expertise and a belief in social solidarity.³¹ The Court's relationship with other common law jurisdictions has also changed over time. While at first, the unification of the common law was seen as important to the preservation of its integrity with the JCPC bringing into line diverging views,³² more recently the JCPC has accepted the need at times to defer to local knowledge and concerns. In a tort case of 1996, it notably held that “[t]he ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.”³³ The JCPC's earlier decision in *Hart v O'Connor*³⁴ indicates, however, the delicate nature of this exercise. In reversing a decision of the New Zealand Court of Appeal, it held that if that decision had been based on considerations peculiar to New Zealand, it would have been unlikely to intervene. Where, however, the question related to a matter of general application throughout all jurisdictions based on the common law, intervention would be justified.

Despite such developments, the overseas jurisdiction of the JCPC has declined since the 1940s as former dominions and colonies have decided to create their own top level courts rather than rely on the Judicial Committee. Today, a total of 27 Commonwealth countries, UK overseas territories and crown dependencies use the JCPC as their final court of appeal.³⁵ Canada, for example, abolished the right of appeal to the JCPC in 1949;³⁶ the Irish Free State in 1933.³⁷ For many of the newly independent members of the Commonwealth in Africa and the Indian subcontinent, the appeal ended soon after independence, although Malaysia and Singapore were later. South Africa, for example, abolished the right to appeal in 1950.³⁸ The decision to

²⁹ *Davison v Vickery's Motors* [1925] HCA 47; 37 CLR 1 at 17 per Isaacs J. See *Alexander E Hall & Co v Mackenna* [1923] IR 402, 403-404 per Lord Haldane: “It is no more an English body than it is an Indian body, or a Canadian body ... The Sovereign is everywhere throughout the Empire in the contemplation of the law”. See also Lord Neuberger in *Willers v Joyce* [2016] UKSC 44; [2016] 3 W.L.R. 534 at para.12.

³⁰ F. Safford and G. Wheeler, *The Practice of the Privy Council in Judicial Matters* (Sweet and Maxwell, 1901) vii.

³¹ P. Mitchell, ‘The Privy Council and the difficulty of distance’ (2016) 36 O.J.L.S. 26, 28. Note also the revealing account of Viscount Haldane, ‘The work for the Empire of the Judicial Committee of the Privy Council’ (1921-23) 1 C.L.J. 143, 148. He argued at 154 that the “real work of the Committee is that of assisting in holding the Empire together”.

³² See, for example, *Victorian Railways Commissioners v Coultas* (1888) 13 App. Cas. 222, 225-226, reversing decision of the Supreme Court of Victoria in which the JCPC was prepared to reject a claim for psychiatric injury on the basis that “learned counsel for the respondents was unable to produce any decision of the English Courts in which ... damages were recovered”.

³³ *Invercargill City Council v Hamlin* [1996] A.C. 624, 640 per Lord Lloyd. For Martin, *Invercargill* reflected real change in how the JCPC regarded its role: “it now seems that the Privy Council has adopted a postmodernist approach, recognising and valuing difference: R. Martin, ‘Diverging common law - *Invercargill* goes to the Privy Council’ (1997) 60 M.L.R. 94, 95.

³⁴ [1985] A.C. 1000, 1017 per Lord Brightman. See D. Capper, ‘The unconscionable bargain in the common law world’ (2010) 126 L.Q.R. 403.

³⁵ See <https://www.jcpc.uk/about/index.html> (accessed 12 November 2018).

³⁶ Criminal appeals to the Privy Council were ended in 1933. Civil appeals ended in 1949, when an amendment to the Supreme Court Act transferred ultimate appellant jurisdiction to Canada. The necessary legislative authority to do so had been conferred by the Statute of Westminster in 1931.

³⁷ The Constitution (Amendment no 22) Act 1933.

³⁸ Privy Council Appeals Act 1950 (SA), s1, amending the South Africa Act 1909 (RSA), s.106.

abolish the right of appeal to the Privy Council signifies that the question of interpretation of domestic law based on English/UK/JCPC sources will in future be a matter for the national courts.

Likewise, the courts of EU Member States are required to apply EU law and judgments of the CJEU, subject to review by the CJEU itself.³⁹ While a court of referral rather than a final court of appeal in the common law sense, there is nevertheless an obligation on domestic courts from which there is no right of appeal to refer unresolved questions of interpretation of EU law to the CJEU.⁴⁰ Failure to do so will risk liability in tort for breach of EU law.⁴¹ Nevertheless the CJEU does accept that at times deference must be made to the national courts. EU law notably makes it clear that the CJEU must respect the Member States' rights to administrative self-organisation and to procedural autonomy subject to the general requirements of effectiveness and equivalence of remedies.⁴² Former CJEU judge Koen Lenaerts has noted therefore that the CJEU seeks to achieve a balance between the need to ensure the uniform application of EU law, whilst respecting the principle that remedies are to be provided by national legal systems.⁴³ The desire to respect local conditions has not, however, always worked well. Tridimas has spoken, for example, of the Court exercising "selective deference"⁴⁴; the CJEU opting at times for a more interventionist position which serves to remind national courts of its role as the authoritative interpreter of EU law. This inevitably gives rise to tensions with the domestic courts and, indeed, at times, distrust. One notable phenomenon in the relationship between national courts and the CJEU has been an apparent reluctance of national courts of final instance to make preliminary references under the art. 267 TFEU procedure. In a number of controversial decisions, the national court has taken the view that the meaning of the legal provisions was in fact sufficiently clear, rejecting the request for a reference (the so-called *acte clair* doctrine).⁴⁵ The *Factortame* litigation also highlights tension between the CJEU and national legislator; the European Court finding the UK Merchant Shipping Act 1988 to be contrary to EU law.⁴⁶ Here, in addition to requiring the national court to override the exercise of sovereign legislative power by the UK Parliament,⁴⁷ the UK government faced liability to pay damages to those individuals who had suffered loss as a consequence of the breach.⁴⁸

³⁹ See art 258 TFEU, art 259 TFEU and the preliminary reference procedure under art 267 TFEU.

⁴⁰ Article 267(3) TFEU. See, generally, M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (2nd edn, OUP, 2014).

⁴¹ C-224/01, *Köbler v Austria*, ECLI:EU:C:2003:513. See also C-173/03, *Traghetti del Mediterraneo SpA (In Liquidation) v Italy*, ECLI:EU:C:2006:391 and Z. Varga, 'National remedies in the case of violation of EU law by Member State courts' (2017) 54 CML Rev 51.

⁴² See P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 239-250.

⁴³ K. Lenaerts, 'National remedies for private parties in the light of the EU law principles of equivalence and effectiveness' [2011] Irish Jurist 13, 37.

⁴⁴ T. Tridimas, 'Liability for breach of community law: Growing up and mellowing down?' (2001) 38 CML Rev 301.

⁴⁵ See *CILFIT v Ministry of Health*, ECLI:EU:C:1982:335. The UK Supreme Court infamously in *Office of Fair Trading v Abbey National Plc* [2009] UKSC 6; [2010] 1 AC 696 relied on the *acte clair* doctrine and refused to make an art 267 reference in circumstances where it disagreed with the interpretation of the law by four experienced judges in the courts below: see A. Arnall, 'The Law Lords and the European Union: swimming with the incoming tide' (2010) 36 EL Rev 57. See more recently A. Limante, 'Recent Developments in the *acte clair* case law of the EU Court of Justice: Towards a more Flexible Approach' (2016) 54 *Journal of Common Market Studies* 1384.

⁴⁶ See, in particular, C-221/89 *R. v Secretary of State for Transport Ex p. Factortame Ltd* EU:C:1991:320, [1991] ECR I-3905; *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603. See J. Hanlon, 'Factortame: Does Britannia still rule the waves?' [1993] Denning L.J. 61.

⁴⁷ See P. Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 Y.E.L. 221; R. Thompson, 'Community law and the limits of deference' [2005] E.H.R.L.R. 243.

⁴⁸ *R. v Secretary of State for Transport, Ex p. Factortame (No.5)* [2000] 1 A.C. 524.

The above analysis highlights that similar questions arise when a jurisdiction leaves the jurisdiction of the JCPC and CJEU. Both courts operate to supervise the correct application of the law (EU/common) in domestic legal systems with the aim of achieving a degree of uniformity. This has led to tensions between the domestic and supranational courts. While the supranational courts have tried to introduce some degree of deference in relation to local considerations, this has not operated consistently over time. In both cases, fundamentally, we see departures – the UK from the CJEU and Commonwealth states from the Privy Council – with the inevitable question of how to treat decisions of the previously superior courts once departure has been secured. This is not to claim that this is an exact analogy – the political context and legal framework is very different – but to highlight that there is enough in common for insights to be gained on a more generalised macro level.⁴⁹

3. Learning from Commonwealth comparisons: Practical examples and citation data

As indicated above, the EU (Withdrawal) Act 2018 indicates that, in terms of precedent, future decisions of the CJEU will be regarded only as “persuasive authority”⁵⁰ (or as Patrick Glenn put it “authority which attracts adherence as opposed to obliging it”).⁵¹ Reference may only be made when “relevant” and even if this test is satisfied, the Act does not indicate how persuasive CJEU authority will be (“may have regard”). Authority tells us that persuasive authority may be viewed as convincing, distinguished or ignored; all we can say for definite is that it cannot compel a certain outcome.⁵² The situation in the UK will be compared, as stated in the introduction, with Australia due to the fact that the departure of Australia from the Privy Council is relatively recent (it abolished appeals partially in 1968 and 1975 and then completely in the Australia Act 1986).⁵³ Finn has noted that the process of developing the common law to meet “their own needs and circumstances and to express their own values and aspirations” began in earnest in Canada in the late 1970s and in Australia and New Zealand in the 1980s.⁵⁴ Yet, as late as 1983, the Council of the New Zealand Law Society announced that it was unanimously opposed to the abolition of appeals to the Privy Council.⁵⁵ It was only in the Supreme Court Act 2003 (NZ) that the right to appeal was ended, recognising that “New Zealand is an independent nation with its own history and traditions.”⁵⁶ New Zealand,

⁴⁹ On the differences between macro and micro-comparisons, see M. van Hoecke, ‘Methodology of comparative legal research’ (2015) *Law and Method* 1; J. Husa, *A New Introduction to Comparative Law* (Hart, 2015) 100-104.

⁵⁰ See R. Brough, ‘Persuasive precedent’ in L. Goldstein (ed), *Precedent in Law* (Clarendon Press, 1987); R. Cross and J.W. Harris, *Precedent in English law* (4th ed., Clarendon Press, 1999) 4-5.

⁵¹ HP Glenn, ‘Persuasive authority’ (1987) 32 McGill L J 261, 263.

⁵² Brough (n 50) at 231.

⁵³ Australia Act 1986 (Cth), s.11. Previous enactments had restricted the Committee’s appellate jurisdiction: Privy Council (Appeals from the High Court) Act 1975 (Cth), s.3 and Privy Council (Limitation of Appeals) Act 1968 (Cth), ss. 3 and 4. See *Viro v The Queen* (1978) 141 C.L.R. 88; *Kirmani v Captain Cook Cruises Pty Ltd (No 2) ex parte Attorney-General (Qld)* (1985) 159 C.L.R. 461, 464-5; *Cook v Cook* (1986) 162 C.L.R. 376, 390; R.S. Geddes, ‘The authority of Privy Council decisions in Australian courts’ (1978) 9 Fed L Rev 427.

⁵⁴ P. Finn, ‘Unity, the divergence: The Privy Council, the common law of England and the common laws of Canada, Australia and New Zealand’ in A. Robertson and M. Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart, 2016) 38.

⁵⁵ K.J. Keith, ‘The unity of the common law and the ending of appeals to the Privy Council’ (2005) 54 I.C.L.Q. 197, 205.

⁵⁶ Section 3(1)(i), Supreme Court Act 2003 (NZ). The Act came into force on 1 January 2004, officially establishing the New Zealand Supreme Court, and at the same time ending appeals to the Privy Council in relation

therefore, can offer little assistance due to the fairly recent demise of the Privy Council (the last case was heard by the Privy Council only in March 2015).⁵⁷ Canada also offers a far earlier comparator and one affected by distinct considerations, for example, the late development of university law schools and, Laskin has argued, a conservative tradition which meant that it was only in the early 1970s that a distinct Canadian jurisdiction came to the fore.⁵⁸

In contrast, in Australia, even prior to 1986, there had been longstanding discussion of the treatment of case-law from both the House of Lords and Privy Council. For much of the 20th century, the Australian courts had tended to treat the House of Lords as having the same authority as the Privy Council in the absence of any evidence of dissent between the two courts. Such a practice was justified on the basis that it would avoid circuity of action and subsequent waste of resources; the same judges operating in both courts.⁵⁹ By the 1960s, however, such uncritical support was coming to an end. Dixon J. famously in *Parker v R*,⁶⁰ argued that, contrary to existing authority, the Australian courts should follow the High Court of Australia (HCA), not the House of Lords, in case of conflict. Kitto J in *Skelton v Collins*⁶¹ agreed that while decisions of the House of Lords must necessarily be regarded as having “peculiarly high persuasive value” and the courts were still bound by decisions of the Privy Council, nothing should diminish the binding force of decisions of the HCA in Australian law. In 1986, the perhaps inevitable final step was taken to reduce all Privy Council decisions to persuasive authority in Australian law.

Australia then provides a good example of a jurisdiction which, in living memory, has moved away from the dominance of a supranational court and is dealing with the issues of interpretation and analysis this paper is examining. It is clear that abolishing the right of appeal to the Privy Council has encouraged the growth of “local” versions of the common law, adapted to that country's own characteristics and the customs of its people.⁶² The next two sections will examine three case studies from contract and tort, and citation data to see whether, in terms of metrics, my analysis is supported by citation research. The aim will be to identify factors which indicate to what extent Australian law still regards decisions of the UK Supreme Court/House of Lords and JCPC as relevant and how persuasive these decisions are in practice.

3.1 Three practical examples.

This section will examine three examples taken from private law in which the Australian High Court was asked to consider the relevance and persuasive force of decisions not only of the Privy Council, but also of the UK Supreme Court/House of Lords. As Justice Gleeson has commented, “in terms of judicial authority and leadership, the distinction between the House of Lords and Privy Council was largely technical. They were the same judges, and they

to all decisions of New Zealand courts made after 31 December 2003. This New Zealand legislation does not, however, affect rights of appeal from the Cook Islands and Niue.

⁵⁷ *Pora v The Queen* [2015] UKPC 9.

⁵⁸ See B. Laskin, ‘The Supreme Court of Canada’ (1951) 29 Can Bar Rev 1046; J. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press, 2002).

⁵⁹ *Piro v W. Foster & Co* (1943) 68 C.L.R. 313, 320 per Latham C.J. Termed by Leigh a “sensible rule of convenience”: L.H. Leigh (1965) 28 M.L.R. 104, 109.

⁶⁰ (1963) 111 C.L.R. 610, 632-633. See also *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 238; [1969] 1 AC 590, 641 (PC accepting that HCA was right not to follow the decision of the UKHL on exemplary damages).

⁶¹ (1966) 115 C.L.R. 94, 104.

⁶² See e.g. M. Vranken, ‘Australia’ in J.M. Smits, *Elgar Encyclopaedia of Comparative Law* (2nd ed., Cheltenham: Edward Elgar, 2012), J Toohey, ‘Towards an Australian Common Law’ (1990) 6 Aust Bar Rev 185.

declared the law for all those courts from whom appeals might come to them.”⁶³ As we will see, while the courts do still refer to UK/Privy Council authority, the persuasive force of such judgments will depend on their merits.⁶⁴ In the words of a leading Australian judge:

There is ... every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances ... The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.⁶⁵

Such arguments cohere nicely with those of the Brexiteers. Leaving the European Union, they assert, will allow the UK to regain its sovereignty and the freedom to ignore future decisions of the CJEU which are not consistent with common law legal development. It will allow English law to revert to ‘pure’ common law reasoning. The case studies examined below will seek to identify factors which will assist us in answering the question whether future decisions of the CJEU will nevertheless continue to influence the interpretation of retained EU private law.

Example One: Learner drivers and breach of duty in negligence

Cook v Cook,⁶⁶ decided in the wake of the Australia Acts, provides an obvious starting point for examining the relationship between UK and Australian courts post-abolition. The case concerned the standard of care expected of a learner driver. The majority of the Full Court of South Australia had followed the views of the majority of the English Court of Appeal in *Nettleship v Weston* to the effect that the duty of care owed by a learner driver to an instructor passenger was the ordinary standard “measured objectively by the care to be expected of an experienced, skilled and careful driver”.⁶⁷ The minority judge (King CJ) had preferred to follow an Australian case.⁶⁸ The High Court cited almost an equal number of Australian and English authorities, but it is noticeable while the English authority is used to establish general principle (e.g. *Donoghue v Stevenson*⁶⁹ and *Hedley Byrne v Heller*⁷⁰), the High Court was determined to follow “the clear trend of authority *in this country* to the effect that special and exceptional circumstances can transform the ordinary relationship of driver and passenger into a special one.”⁷¹ It added that:

... in this country ... it has long been accepted that it is for the legislature, and not the courts, to decide whether considerations of social policy make it desirable that the traditional standards of the law of negligence should be abandoned in favour of a system of liability without fault.⁷²

⁶³ M. Gleeson, ‘The influence of the Privy Council on Australia’ (2007) 29 Aust. Bar Rev 123, 129.

⁶⁴ See Justices Kirby (High Court of Australia) and Sharpe (Court of Appeal for Ontario) in ch 19: ‘The Old Commonwealth’ in L Blom-Cooper QC, B Dickson and G Drewry (eds), *The Judicial House of Lords 1876-2009* (OUP 2009).

⁶⁵ A Mason, ‘Future Directions in Australian Law’ (1987) 13 Monash L R 149, 154.

⁶⁶ [1986] HCA 73, (1986) 162 C.L.R. 376, 385.

⁶⁷ [1971] 2 Q.B. 691, 702. While not a House of Lords judgment, it is regarded in English law as authoritative on this question.

⁶⁸ *The Insurance Commissioner v Joyce* (1948) 77 C.L.R. 39, relying largely on the judgments of Latham CJ and Dixon J.

⁶⁹ [1932] A.C. 562.

⁷⁰ [1964] A.C. 465.

⁷¹ (n 66) para. 11 (emphasis added).

⁷² *Ibid.*, para.12.

Although the Court in *Imbree v McNeilly*⁷³ overturned *Cook* and rejected the ruling that allowance should be made for the inexperience of the learner, this was achieved with reference to subsequent decisions of the High Court:

... what distinguishes the principle established in *Cook v Cook* from cases of the kind just mentioned is that *Cook v Cook* requires the application of a different standard of care In all other cases in which a different level of care is demanded, the relevant standard of care is applied uniformly ... The principle adopted in *Cook v Cook* departed from fundamental principle and achieved no useful result.⁷⁴

What we see is a preference for national courts to dictate matters of social policy and of constitutional importance, such as the relationship of the legislature and the courts. Lord Denning MR in *Nettleship* is condemned for overstepping his role as a judge. In relation to such matters, therefore, external sources are likely to be less persuasive.

Example two: Promissory estoppel as a cause of action

The second example illustrates the willingness of the Australian courts to diverge from the approach of the English courts despite the common foundational sources. Both jurisdictions had expressed reluctance for many years to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that she would do something in the future on the basis that it might outflank the doctrine of consideration.⁷⁵ Nevertheless, in *Waltons Stores (Interstate) Ltd v Maher*⁷⁶ the majority of the High Court held that promissory estoppel could, in an appropriate case, create a cause of action. By favouring a greater emphasis on unconscionability, the crucial question became: was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality?⁷⁷ It was held that the appellant was estopped in all the circumstances from retreating from its implied promise to complete the contract.

The decision in *Walton Stores* is important in that it challenges English orthodoxy not simply on the point whether promissory estoppel can apply prior to contract, but in terms of the very relationship between estoppel and consideration in contract law, the remedies available to the court in estoppel cases,⁷⁸ and to what extent a more flexible concept of equitable estoppel was needed.⁷⁹ In moving towards a willingness to see notions of good faith and unconscionability in the pre-contractual phase,⁸⁰ rejected by the House of Lords in no uncertain terms in *Walford v Miles*,⁸¹ and a broader principle of equitable estoppel, we see again the Australian courts taking their own distinct view on matters of policy and principle. 'Classic' English authority

⁷³ [2008] HCA 40, (2008) 236 C.L.R. 510.

⁷⁴ *Ibid.*, paras. 70-72 per Gummow, Hayne and Kiefel JJ.

⁷⁵ As stated by Denning LJ in *Combe v Combe* [1951] 2 K.B. 215, 220. See also *Hughes v Metropolitan Railway Co.* (1877) 2 App Cas 439, 448; *Gray v Lang* (1955) 56 SR(NSW) 7, 13.

⁷⁶ [1988] HCA 7, (1988) 164 C.L.R. 387.

⁷⁷ *Ibid.*, para.36.

⁷⁸ See A. Robertson, 'Reliance and expectation in estoppel remedies' (1998) 18 L.S. 360; J. Edelman, 'Remedial certainty or remedial discretion in estoppel after *Giumelli*' (1999) 15 JCL 179.

⁷⁹ See E. McKendrick, *Contract Law* (12th ed., Palgrave Macmillan, 2017) para.5.28; M. Chen-Wishart, *Contract Law* (6th ed. OUP, 2018) at 158-161.

⁸⁰ See A.F. Mason, 'Contract, good faith and equitable standards in fair dealing' (2000) 116 L.Q.R. 66, 90 and Finn (n 54) 47.

⁸¹ [1992] 2 A.C. 128. See J. Cumberbatch, 'In freedom's cause: the contract to negotiate' (1992) 12 O.J.L.S. 586.

such as *High Trees*,⁸² *Hughes v Metropolitan Railway Co*⁸³ and *Combe v Combe*,⁸⁴ and Privy Council⁸⁵ authority is cited, but notably reference is also made to Australian scholarship, including Paul Finn's essay on 'Equitable Estoppel'⁸⁶ and the Greig and Davis Contract Law textbook.⁸⁷ Reference is also made to the direct enforcement of promises made without consideration by means of promissory estoppel in the United States Restatement on Contracts 2d 90,⁸⁸ although the Court did flag the need for caution due to the fact that the US doctrine of promissory estoppel has developed partly in response to its particularly narrow bargain theory of consideration.⁸⁹ Context is important.

Duthie noted the division which ensued between the two jurisdictions:

The approach of the High Court of Australia has been to expand the category of rights to which equity will have regard beyond positive, enforceable rights, to include those rights which one party is capable of conferring upon another. It remains to be seen whether the English courts will follow suit.⁹⁰

The English courts did not follow suit. In *Baird Textile Holdings Ltd v Marks & Spencer Plc*,⁹¹ the Court of Appeal stated clearly that "English law, as it now stands, does not permit the enforcement of an estoppel in the form alleged in this case."⁹² The Court of Appeal held that there was no real prospect of the claim succeeding unless and until the law is developed, or corrected, by the House of Lords. This has not occurred.

In seeking relevant authority, then, the Australian courts not only look beyond the UK to the United States, but are not afraid to develop policy and principle in a distinctive Australian fashion. This does not mean that the Australian law of estoppel is divorced completely from English law. Commentators have noted that there remains some debate in Australia whether *Walton Stores* did indeed create an independent cause of action based on promissory estoppel or whether it should still be regarded as acting in a defensive capacity.⁹³ Bryan observes, for example, that more recently the High Court has been less inclined to embark on the exercise of reshaping fundamental doctrine where innovation is unnecessary to decide the case at hand, and that, on that basis, there is a "new sobriety" in the HCA with *Waltons Stores* making only fleeting appearances in the judgments.⁹⁴

Walton Stores highlights that the nature of persuasive authority post-Australia Acts is one of ongoing dialogue within the common law. Nevertheless, where the courts believe that a change

⁸² *Central London Property Trust Ltd v High Trees House Ltd* [1947] K.B. 130.

⁸³ (1877) 2 App Cas 439.

⁸⁴ [1951] 2 K.B. 215.

⁸⁵ *Ajayi v Briscoe* [1964] 1 WLR 1326; *Bank Negara Indonesia v Philip Hoalim* (1973) 2 MLJ 3; *Attorney-General of Hong Kong v Humphreys Estate Ltd* [1987] 1 A.C. 114.

⁸⁶ See P.D. Finn, (ed.), *Essays in Equity* (Sydney: Law Book Co, 1985).

⁸⁷ DW Greig and JLR Davis, *The Law of Contract* (Law Book Co., 1987).

⁸⁸ Citing E.A. Farnsworth, *Contracts* (Boston: Little, Brown, 1982) 2.19; G. Gilmore, *The Death of Contract* (Columbus, Ohio, 1974), 129.

⁸⁹ *Walton Stores* (n 76) para.24.

⁹⁰ A. Duthie, 'Equitable estoppel, unconscionability and the enforcement of promises' (1988) 104 L.Q.R. 362, 366.

⁹¹ [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737.

⁹² Morritt VC *ibid.*, at para. 39.

⁹³ See A. Sillink, 'Can promissory estoppel be an independent source of rights?' (2016) 40 UWA L Rev 39 who has identified ongoing uncertainty in some Australia states whether promissory estoppel can be an independent sources of rights: see, for example, *Saleh v Romanous* (2010) NSWCA 274, (2010) 79 NSWLR 453 which (obiter) stated that it is "negative in substance" (Handley JA at para. 74).

⁹⁴ M. Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 131, 134.

in the law is needed, the High Court is more than willing to reject the UK/Privy Council position in favour of one deemed more consistent with national needs.

Example three - A legislative example: Contributory negligence and contract law

The final example considers the interpretation of UK-based legislation post-abolition. This offers a particularly useful perspective in that the problems facing the courts in interpreting s.6(2) are likely to arise in relation to UK legislation transposing EU directives. In common with many common law jurisdictions, Australian states and territories chose to enact legislation which followed the wording of the Law Reform (Contributory Negligence) Act 1945 (UK). One issue which has arisen is the extent to which the Act can apply to cases where there is concurrent liability in contract and tort. The English court in *Forsikringsaktieselskapet Vesta v Butcher*⁹⁵ resolved that where the contractual duty of care is the same as liability in the tort of negligence, the 1945 Act should apply. Faced with the same question of statutory interpretation in 1999, the High Court in *Astley v Austrust Ltd*⁹⁶ chose to differ. Despite the wording of s.27A, Wrongs Act 1936 (SA) being identical to s.4 of the 1945 Act, the High Court refused to be persuaded by the reasoning in *Vesta v Butcher* and held that the defence of contributory negligence would be confined to liability in tort:

The natural and ordinary meaning of s 27A(3), read in the light of the definitions contained in the section, indicates that the section is concerned with claims in tort rather than claims in contract. The sub-section was designed to remedy the evil that the negligence of a plaintiff, no matter how small, which contributed to the suffering of damage, defeated any action in tort in respect of that damage.⁹⁷

The Court found nothing in the ordinary and natural meaning of the section that could be said to assume or by necessary implication authorise the apportionment of damages in claims for breach of contract. On its face, therefore, the section dealt only with actions in tort. This conclusion was supported by the wording of the text and the history of the provision. While *Vesta* was discussed by the Court, with acknowledgement that at least initially some Australian courts had followed its approach, the High Court simply labelled these cases as “wrong”, and criticised them for flawed reasoning in straining the wording of the statute and ignoring “the mischief which the legislation was intended to remedy.”⁹⁸

Although political considerations have led to a legislative reversal of this decision,⁹⁹ it represents a good example of the tension that can arise when courts, faced with exactly the same wording, sources and interpretative tools reach very different conclusions as to the meaning of a statutory provision.¹⁰⁰ In *Vesta* the court is clearly prepared to adopt a more liberal approach, reaching the desired result by a rather technical interpretation of sections 1 and 4 of the Act;¹⁰¹ *Astley* adheres more strictly to rules of common law statutory

⁹⁵ [1989] A.C. 852, 875, cited with approval in *Henderson v Merrett Syndicates* [1995] 2 A.C. 145. See also *Mouat v Clark Boyce* [1992] 2 NZLR 559, 564-565 (New Zealand).

⁹⁶ (1999) 197 C.L.R. 1.

⁹⁷ *Ibid.*, para.41.

⁹⁸ *Ibid.*, para.70.

⁹⁹ See Law Reform (Miscellaneous Provisions) Amendment Act 2000 (NSW); Law Reform (Contributory Negligence) Amendment Act 2001 (Qld), for example.

¹⁰⁰ See T.M. Fitzpatrick, ‘Contributory Negligence and Contract—A Critical Reassessment’ (2001) 30 C.L.W.R. 255.

¹⁰¹ See O’Connor L.J. in *Vesta* (n 95) 862.

interpretation¹⁰² and leaves it for the legislature to intervene. Both are responding to a situation which did not arise when the 1945 statute was drafted: concurrent liability in contract and tort.¹⁰³ The court in *Vesta* achieves the practical result that an injured party cannot evade the defence by simply suing in contract where she also had a claim in tort.¹⁰⁴ For the Australian courts, this is a step too far. As Fitzpatrick noted, the issue here is not what canon of statutory interpretation one uses, but rather the “leeways of choice” which the judiciary possess in deciding how to interpret the law.¹⁰⁵ A common form of wording does not necessarily, therefore, lead to a common application of the law. s.6(1) of the 2018 Act makes it very clear that while s.6(3) indicates that retained EU law should be interpreted purposively, the CJEU has no future mandate in correcting any mis-interpretations (in its view) of EU law by the UK courts. s.6(2) leaves it to the UK courts to determine to what extent they choose to have regard to any relevant subsequent decisions of the CJEU.

3.2 Understanding persuasive authority in the High Court of Australia: Citation data.

The treatment of persuasive authority, then, will vary: it may be of minor suppletive importance or recognised as an authoritative text, depending on the needs of practice and the choices of the courts.¹⁰⁶ A number of citation studies has sought to identify the impact of foreign precedents on the courts of Commonwealth countries. Notably in Australia the work of Russell Smyth has provided some revealing data on the citation practices of the courts.¹⁰⁷ On a basic level, while the principle of *stare decisis* requires citation of authority, persuasive authority will only be used where it is seen to assist in the development of legal principle and regarded as increasing the force of the judge’s reasoning.¹⁰⁸ Trends in citation practice, therefore, provide a window into what courts regard as sound legal reasoning over time. Further studies have identified prestige and reputation as important factors, with certain courts (e.g. US Supreme Court; Supreme Court of Canada; UK Supreme Court) having particular resonance in the common law world.¹⁰⁹ Merryman agrees: “the fact of citation gives a work authority to some degree and thus it will exert some influence on the way the law grows.”¹¹⁰

¹⁰² Notably the literal, golden and mischief rules: see F. Bennion, *Understanding Common Law Legislation: Drafting and interpretation* (OUP, 2009) who argues that these are not in reality the sole criteria used by the courts and that values and culture are also relevant.

¹⁰³ The High Court in *Astley* (n 96, paras.47-48) recognised the validity of the UK decision, *Henderson v Merrett Syndicates* [1995] 2 A.C. 145.

¹⁰⁴ See E. Peel, *Treitel: The Law of Contract* (14th ed, Sweet and Maxwell, 2015) at 20-110; O’Connor L.J. in *Vesta* [1989] A.C. 852, 860; A.S. Burrows, ‘Contributory Negligence – a Defence to Breach of Contract?’ (1985) 101 L.Q.R. 161, 164.

¹⁰⁵ Fitzpatrick (n 100) 271.

¹⁰⁶ Glenn (n 51) 264.

¹⁰⁷ For example, see R. Smyth, ‘Citations by Court’ in M. Coper, A. Blackshield and G. Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP Melbourne, 2001) 98; R. Smyth, ‘Other than “Accepted Sources of Law”? A Quantitative Study of Secondary Source Citations in the High Court’ (1999) 22 UNSWLJ 19; R. Smyth, ‘Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court’ (1998) 17 University of Tasmania L Rev 164.

¹⁰⁸ I Nielsen and R Smyth, ‘One Hundred Years of Citation of Authority on the Supreme Court of New South Wales’ (2008) 31 UNSWLJ 189, 192-193.

¹⁰⁹ J Bell, ‘The Relevance of Foreign Examples to Legal Development’ (2011) 21 Duke J Comp & Intl L 433; C McCrudden, ‘A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 O.J.L.S. 499; B Flanagan and S Ahern, ‘Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges’ (2011) 60 I.C.L.Q. 1.

¹¹⁰ J.H. Merryman, ‘The Authority of Authority: What the California Supreme Court Cited in 1950’ (1954) 6 Stanford Law Review 613.

Looking at citations post- Australia Acts 1986 in the Supreme Court of New South Wales in 2008,¹¹¹ Nielsen and Smyth found that while decisions of the House of Lords and English Court of Appeal are not binding on the State Supreme Courts, they have always been regarded as highly persuasive. Nevertheless, the status of English case law in Australia has diminished since 1986. While decisions of the House of Lords and English Court of Appeal continue to be given great respect, Australian courts are now much less likely to follow them than was once the case. Privy Council decisions are also now cited rarely, largely due to their limited number following the abolition of appeals from all the major Commonwealth countries.¹¹² Since 1965, they find that citations of English authorities as a proportion of total citations have been on a downward spiral.¹¹³ Instead increased reference is being made to other common law jurisdictions, notably New Zealand, United States and Canada.¹¹⁴

Smyth's research into citation patterns in the High Court of Australia reaches similar conclusions. He finds that whilst in 1920 and 1940 the High Court cited English decisions more than decisions of Australian courts, in 1960, 1980 and 1996, there were increases both in the number of Australian cases cited by the Court and in the proportion of Australian cases relative to the proportion of English cases. In particular, in 1920, the Privy Council received 13.5 per cent of total citations, but in 1996 the comparable figure was just 2.2 per cent. In contrast, citations of previous decisions of the High Court increased from 24 per cent in 1920 to 47.4 per cent in 1996. Further, citations of foreign precedents other than those of English courts have been on the increase. In cases, for example, such as *Cattanach v Melchior*¹¹⁵ which raise issues of moral and social policy such as wrongful birth, the High Court has also drawn on civil law sources and the law of South Africa. In Smyth's view, this provides clear evidence to support the view that since the abolition of appeals from the High Court to the Privy Council, a new Australian jurisprudence is emerging, in which the Court's role as a final court of appeal has been enhanced. By this means, the HCA is developing "a common law suited to Australia's needs."¹¹⁶

Such results are consistent with research undertaken in New Zealand and Canada. Since abolition, the New Zealand Supreme Court (NZSC) has been hearing a much higher volume and broader range of appeals. Lyon asserts that the NZSC is, as a result, now able to cite more New Zealand jurisprudence and uses a broader range of case-law.¹¹⁷ Citation of English cases, although still substantial, has declined relative to the citation of cases from other jurisdictions.¹¹⁸ Smithey in her study of Canadian and South African constitutional law also notes continued use of foreign law due to its utility in cutting information costs, decreasing uncertainty, and providing a justification for legal development. This is matched, however, by a decline in reliance on foreign sources as time passes and the availability of indigenous

¹¹¹ n 108.

¹¹² J. Goldring, *The Privy Council and the Australian Constitution* (University of Tasmania Press, 1996) 73–80. See also Sawyer (n 26), 145.

¹¹³ Nielsen and Smyth (n 108) at 208-209.

¹¹⁴ See B. Topperwien, 'Foreign precedents' in Coper et al (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001) 280. See also Gleeson (n 63) 133.

¹¹⁵ (2003) 215 C.L.R. 1, paras.131-132

¹¹⁶ R. Smyth, 'Citations by court' (n 107).

¹¹⁷ R. Lyon, 'Independence, access to justice, and the patriation of New Zealand's Final Court of Appeal' (LLM thesis, 2014).

¹¹⁸ For a study prior to abolition of the right to appeal to the Privy Council in 2004, see, R. Smyth, 'Judicial Citations - An Empirical Study of Citation Practice in the New Zealand Court of Appeal' (2000) 31 *Victoria University of Wellington Law Review* 847.

constitutional precedent increases.¹¹⁹ Foreign precedent, she asserts, is found to be particularly useful when there were higher rates of disagreement and their need for justification was highest – its *raison d'être* is its utility.

4. Commonwealth comparisons – Lessons to be learnt for post-Brexit private law?

A number of Australian commentators have reflected on the changes which have followed since the Australia Acts ended the final link between the JCPC and HCA. Vranken remarks on the fact that while in colonial times the application of English law in Australia was deemed self-evident, post-1986, despite being only persuasive authority, Australian court decisions do still cite English case-law, at times in great detail.¹²⁰ Luntz has noted, however, that in tort law at least, this has not stopped the Australian courts developing their own tests for key concepts such as breach of duty and vicarious liability.¹²¹ Justice Michael Kirby has also noticed that the High Court has deviated from the line taken by the House of Lords on a growing number of issues, for example in relation to damages for gratuitous services,¹²² immunity for barristers' negligence,¹²³ nervous shock,¹²⁴ and many other topics.¹²⁵ It would seem that a distinctive Australian identity is being consciously fostered.¹²⁶

What guidance, then, can we draw from the above experience in relation to the likely interpretation of retained EU private law post-Brexit? The UK government has given no indication that it intends to overturn legislation based on EU directives in this field. Statutes such as the 2015 Consumer Rights Act will remain, containing rights based on EU law, namely the provisions of the Consumer Sales Directive 99/44/EC, the Unfair Terms in Consumer Contracts Directive 93/13/EEC and the Consumer Rights Directive 2011/83/EU. The Consumer Protection Act 1987 Part I will further continue to offer consumers the benefit of strict liability based on the Product Liability Directive 1985/374/EEC. Other examples may be found in both contract, commercial and tort law.¹²⁷ To what extent, then, is the interpretation of these provisions, whose primary source was EU law, likely to remain close to that found in the EU? Will the national courts continue to refer to decisions of the CJEU or move towards a more traditional common law interpretation? The Act merely requires that the courts refer to retained case-law and principles (s.6(3)) – subsequent guidance emanating from the EU *may* be regarded *so far as it is relevant* (s.6(2)). Leading contract lawyer McKendrick takes the view that “[j]udicial comity would appear to demand that some weight be given to [CJEU]

¹¹⁹ S.I. Smithey, ‘A tool, not a master: The use of foreign case law in Canada and South Africa’ (2001) 34(10) *Comparative Political Studies* 1188. See also G. Gentili, ‘Canada: Protecting rights in a worldwide culture. An empirical study of the use of foreign precedents by the Supreme Court of Canada (1982-2010)’ in T. Groppi et al, *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013) and B. Roy, ‘An empirical survey of foreign jurisprudence and international instruments in charter litigation’ (2004) 62v U Toronto Fac L Rev 99-148.

¹²⁰ Vranken (n 62) 120.

¹²¹ H. Luntz, ‘Throwing off the chains: English precedent and the law of torts in Australia’ in M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds), *The Emergence of Australian Law* (Sydney: Butterworths, 1989) 70-88.

¹²² *Hunt v Severs* [1994] 2 A.C. 350. Cf *Kars v Kars* (1996) 187 C.L.R. 354.

¹²³ *Arthur JS Hall v Simons* [2002] 1 A.C. 615. Cf *D’Orta-Elenaike v Victoria Legal Aid* (2005) 223 C.L.R. 1.

¹²⁴ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310; *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455. Cf *Annetts v Australian Stations Pty Ltd* (2002) 211 C.L.R. 317; *Gifford Strary Patrick Stevedoring Pty Ltd* (2003) 214 C.L.R. 269.

¹²⁵ Kirby (n 64) 344.

¹²⁶ Sir R. Cooke, ‘Divergences – England, Australia and New Zealand’ [1983] N.Z.L.J. 297.

¹²⁷ See, for example, Twigg-Flesner (n 12) and Giliker (n 16).

decisions [post-Brexit], although the precise weight to be attributed may depend upon the facts and circumstances of the individual case.”¹²⁸ The key question then is, assuming courts still refer to CJEU decisions, just how *persuasive* will they be once the obligation to follow such case-law has been removed.

It is submitted that drawing on the experience in Australia is useful in identifying four key factors which the Australian courts have treated as important in citing UK case-law. First, a clear issue is one of **respect** for a court which is deemed to have authority/prestige and deliver high quality judgments. Justice Gleeson, for example, notes that decisions of the UK Supreme Court and Privy Council are powerful formal sources of international influence.¹²⁹ The High Court in *Cook v Cook* equally remarked that it was inevitable and desirable that the Australian courts should continue to obtain assistance and guidance from the learning and reasoning of the UK courts.¹³⁰ Justice Kirby goes further and argues that “the integrity of courts, the judicial methodology, and the basic doctrines of the legal order constitute some of the most precious exports of the United Kingdom to the whole world.”¹³¹

Secondly, as a common law jurisdiction whose sources are part of the historical framework of Australian law and still found in textbooks and cited in court, the **historical legacy** is significant. The countries have been tied together since the late 18th century colonisation of Australia, with the colonists inheriting English case and statute law as was applicable, in the famous words of Blackstone, “to their own situation and the condition of the infant colony”.¹³² Despite the establishment of the Commonwealth of Australia in 1901, the Australian courts continued to follow English law for much of the 20th century; the High Court decision in *Parker v R* in 1963 being taken to signify a change in approach, laying the foundations for the law we see today. As Justice Kirby has observed, the result is a common methodology and shared basic doctrines which encourage ongoing ties between the systems.¹³³

From this follows a third point – that of **dialogue and communication**. The ties between English and Australian lawyers remain to this day. Justice Edelman of the High Court of Australia provides a modern example of a lawyer, educated in Australia and the UK, appointed to a chair in the Law of Obligations at the University of Oxford prior to being appointed to the bench in Australia. It is clear that UK and Australian lawyers, judges and practitioners share a dialogue, as evidenced by the biennial Obligations conferences founded by the University of Melbourne, but held in common law jurisdictions across the world.¹³⁴ This does not mean that they will always agree, but they understand the meta-language of the common law with its shared values, procedural rules and terminology.

Finally, there is the issue of **legislative change**. The examples given above feature areas of contract and tort law where principles are shared and legislature is exactly worded. Australian

¹²⁸ E. McKendrick, *Contract Law* (12th ed., Palgrave, 2017) 336 (emphasis added).

¹²⁹ Gleeson (n 63) 132.

¹³⁰ (1986) 162 C.L.R. 376, 385.

¹³¹ (n 64) 350.

¹³² See s 24 of the Australian Courts Act 1828 (Imp); Kirby (n 64) 340.

¹³³ See also Saunders and Stone who agree that the greater use of foreign precedents in the common law courts is likely to be a result of the historical links between these legal systems and common judicial styles: C. Saunders and A. Stone, ‘Reference to Foreign Precedents by the Australian High Court: A Matter of Method’ in T. Groppi and M-C Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013).

¹³⁴ <https://www.obsconf.com/> (accessed 12 November 2018). The Obligations IX conference, for example, was hosted by the University of Melbourne and the University of Oxford and included academic, practitioner and judicial speakers from both jurisdictions.

Justices have recognised, however, that over time, legislation in the UK and Australia will diverge even in the laws of contract and tort.¹³⁵ The impact, for example, of EU law on UK contract and tort law and the Civil Liability Acts introduced across Australia in the early 2000s¹³⁶ have inevitably made citation of UK law of limited, if any, relevance in the interpretation of specific statutory provisions. While, therefore, UK law may be regarded as persuasive in relation to legal principle, legislative inconsistency will force the courts to prioritise their own domestic case-law.

If we apply these four factors to the question raised in this article, then the picture post-Brexit, despite the express terms of s.6(2) allowing the courts to refer to relevant CJEU authority, looks somewhat pessimistic for those hoping that the UK courts will continue to reach to EU sources for guidance in the long term. Even if the courts are prepared to recognise such authority as “relevant” – and it is difficult to see how this can be denied in terms of a CJEU ruling directly on the meaning of a particular provision of a Directive – the question of **respect** may diminish the persuasive nature of such authority. While many UK judges do have respect the judgments of the CJEU, the very different methodology of the court – both in terms of drafting judgments and lack of a doctrine of precedent – has left the UK courts uncertain at times of the quality of the guidance they obtain. One classic tort example involves an art. 267 reference on the limitation period imposed by the Product Liability Directive in relation to a claim brought in 2002. (The preliminary reference procedure being the main means by which national courts seek guidance on the interpretation of EU law). The first decision of the CJEU (*O’Byrne v Sanofi Pasteur MSD Ltd*¹³⁷) provided the rather oblique guidance that “it is as a rule for national law to determine the conditions ... A national court ... must, however, ensure that due regard is had to the personal scope of Directive 85/374, as established by articles 1 and 3 thereof”.¹³⁸ This less than straightforward statement resulted in a second reference to the European Court of Justice in 2008 requesting clarification.¹³⁹ The matter was finally resolved by the Grand Chamber in 2009.¹⁴⁰ It was only in 2010, seven years after the initial claim had been stayed to resolve this point, that the UK court was able to state that the action would not be permitted under the Directive in question. Such examples do not assist in building trust between the national courts and the CJEU in terms of either the preliminary reference procedure or the clarity of the guidance provided therefrom.

Arnall has indicated that part of the problem may be the style and content of CJEU judgments.¹⁴¹ The CJEU, as a court of its Member States, consisting of one judge from each EU country, reflects the views of lawyers across Europe but importantly of a mixture of legal traditions: civil law, Scandinavian law, mixed jurisdictions, with the common law in the minority. The style in which judgments are written, originally modelled on the civil law legal tradition (notably that of the French *Conseil d’Etat* and *Cour de cassation*), means, Arnall argues, that they lack sureness of touch when dealing with previous decisions and rarely engage in serious interpretive or policy analysis.¹⁴² He is particularly critical of the absence of

¹³⁵ Gleeson (n 63).

¹³⁶ Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (Canberra 2002); B McDonald, ‘The Impact of the Civil Liability Legislation on Fundamental Principles and Policies of the Common Law of Negligence’ (2006) 14 T.L.J. 268.

¹³⁷ (C127/04) EU:C:2006:93; [2006] 1 W.L.R. 1606 (ECJ).

¹³⁸ *Ibid.*, at para.39.

¹³⁹ *OB v Aventis Pasteur* [2008] UKHL 34; [2008] 3 C.M.L.R. 10.

¹⁴⁰ (C-358/08) *O’Byrne v Aventis Pasteur SA* [2010] 1 W.L.R. 1375.

¹⁴¹ See B.S. Markesinis, ‘A Matter of Style’ (1994) 110 L.Q.R. 607; M de S-O l’E Lasser, *Judicial deliberations* (OUP, 2004).

¹⁴² A. Arnall, ‘Judicial Dialogue in the European Union’ in J. Dickson and P. Eleftheriadis, *Philosophical*

dissenting opinions which, he suggests, might reduce the pressure on the CJEU to accommodate within its judgments points of view which are essentially irreconcilable, leading to a lack of clarity.¹⁴³ EU judgments are, he asserts, impenetrable to non-specialists and often make no real attempt to persuade a sceptical reader of the correctness of the result. Other commentators have noted that EU law requires the UK courts to engage with different modes of reasoning, notably a purposive or teleological approach,¹⁴⁴ and distinct policy goals.¹⁴⁵

Such criticisms serve to highlight that even after 40 years of judgments, common lawyers are far from reconciled to the style of CJEU judgments and the different methodology of a non-common law court. There remains an underlying suspicion, therefore, of a lack of quality. This might seem surprising given that the CJEU is a specialist court with obvious expertise in EU law. Nevertheless, Elaine Mak in her fascinating study of UK citation patterns has highlighted that UK judges find judgments of the CJEU difficult to read, describing them as “Delphic”, containing at times “flabby reasoning”.¹⁴⁶ For Stanton, it is a matter of the common law mind set. Common law judges place a heavy reliance on the discovery of policies and principles within the text of cases.¹⁴⁷ This impedes, in his view, recognition of the value of case-law which has no concept of *stare decisis* or favours a different methodology.

Stanton’s argument is linked in many ways to the second factor identified above - the **historical ties** between UK and EU law. The UK joined the EU in 1973, but study of EU law only became compulsory in UK universities in the 1990s. It also took some time for States to appreciate that EU law would intervene in both public and private law matters.¹⁴⁸ We see, for example, the emergence of EU principles of tort law from the 1980s onward.¹⁴⁹ In contrast with the development of the common law over centuries, this is a short timeframe (it also means that much of the current judiciary will not even have studied EU law during their undergraduate degrees). Comparative studies have shown that despite the influence of EU (and ECHR) law, in general, English judges continue to prefer using comparative law material from other common law jurisdictions rather than that of the EU or other EU Members States.¹⁵⁰ From the universities perspective, post-2019 many are likely to make study of EU law optional, competing against other optional units such as international trade and WTO law. The reality is that, in private law, EU law has never had the impact seen in areas such as employment and competition law. Private law is still seen as “common law” with limited intervention by EU directives since 1973. Further, many of the rights noted above form part of general Acts of Parliament. Statutes such as the Consumer Rights Act 2015 mix EU- and UK-sourced rights without any acknowledgement of their original sources. While private lawyers may continue to ponder the meaning of “defect” under s.3 of the Consumer Protection Act 1987 and “good

Foundations of European Union Law (OUP, 2013) 132.

¹⁴³ A. Arnall, *The European Union and its Court of Justice* (2nd ed., OUP, 2006), 9–14.

¹⁴⁴ See J Komárek, ‘Legal reasoning in EU law’ in: D. Chalmers and A. Arnall (eds), *The Oxford Handbook of European Union Law* (OUP, 2015); G. Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, 2013).

¹⁴⁵ See P. Giliker, *The Europeanisation of English Tort Law* (Hart Publishing, 2014) Ch 2; TC Hartley, *The Foundations of European Union Law* (8th ed., OUP, 2014) 72.

¹⁴⁶ E. Mak, ‘Why do Dutch and UK judges cite foreign law?’ (2011) 70 C.L.J. 420, 433–435.

¹⁴⁷ K. Stanton, ‘Comparative law in the House of Lords and Supreme Court’ (2013) 42 C.L.W.R. 269, fn 148. See also A. Burrows, ‘The Influence of Comparative Law on the English Law of Obligations’ in A. Robertson and M. Tilbury, *The Common Law of Obligations: Divergence and Unity* (Hart, 2016).

¹⁴⁸ D. Caruso, ‘The missing view of the cathedral: The private law paradigm of European legal integration’ (1997) 3 E.L.J. 3.

¹⁴⁹ P. Giliker, ‘What do we mean by “EU tort law”?’ in Giliker (n 16) 10–11.

¹⁵⁰ See Stanton (n 147); P. Giliker, ‘The influence of EU and European human rights law on English private law’ (2015) 64 I.C.L.Q. 237.

faith” under s.62 of the Consumer Rights Act 2015,¹⁵¹ it is difficult to argue that this factor is as powerful as seen in relation to Australia.

One means of overcoming the deficiencies in factors (i) and (ii) above, however, would be that of **dialogue and communication**. If post-Brexit, academics, practitioners, and the judiciary continue to engage with EU law and decisions of the CJEU, an ongoing positive relationship is more likely to follow. At present there are many manifestations of such dialogue – the foundation of the European Law Institute¹⁵²; the Council of Bars and Law Societies of Europe which claims to be “the voice of the European legal profession”,¹⁵³ the European Consumers Association¹⁵⁴ - and judicial engagement, for example in the Network of the Presidents of the Supreme Judicial Courts of the EU.¹⁵⁵ Will membership of these organisations continue post-Brexit? How easy will such conversations be? Pragmatically, it remains the case that once one is no longer a President of a Supreme Judicial Court of the EU, maintaining a dialogue will require more effort. Lord Reed in a recent speech, while praising his European counterparts, noted nonetheless that Supreme Court judges had more long-standing ties with the common law courts with which it shared a common language, procedure and style of judgment. Mastering a shared European cultural tradition had been “a challenge”.¹⁵⁶

One final issue is that of **legislative change** and this goes straight to the heart of the question of relevance. s.6(2) only permits reference to EU sources when “relevant”. Can EU law be said to satisfy this criterion if, due to legislative change, it no longer mirrors that retained on Brexit day? In his State of the Union address in September 2017, the European Commission President Jean-Claude Juncker announced that the Commission planned to introduce a “New Deal for Consumers”, which would strengthen the enforcement of EU consumer law. Recent proposals include a new directive which would amend Directive 93/13/EEC on unfair terms, Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights.¹⁵⁷ This is in addition to the 2015 proposals for new maximum harmonisation directives which would regulate contracts for the supply of digital content¹⁵⁸ and sale of goods contracts.¹⁵⁹ If the UK had stayed in the EU, these measures (if brought into force) would have led to reforms to the Consumer Rights Act 2015 and related statutory instruments and would potentially have introduced new rights to consumers. Post-Brexit and any agreed transition period, such measures raise the prospect that UK law will differ from that of the rest of the EU, and, more significantly, that the “relevance” of decisions of the CJEU will be diminished. On

¹⁵¹ See, for example, H. Collins, ‘Good faith in European Contract Law’ (1994) 14 OJLS 229.; S. Weatherill, *EU Consumer Law and Policy* (2nd ed., Edward Elgar, 2013) 151-152.

¹⁵² <https://www.europeanlawinstitute.eu/> (accessed 12 November 2018) whose members currently come from over 50 different countries in Europe and beyond.

¹⁵³ <http://www.ccbe.eu/> (accessed 12 November 2018).

¹⁵⁴ <http://www.beuc.eu/> (accessed 12 November 2018).

¹⁵⁵ <http://network-presidents.eu/> (accessed 12 November 2018).

¹⁵⁶ Lord Reed, ‘Comparative Law in the Supreme Court of the United Kingdom’ University of Edinburgh 13 October 2017, 8.

¹⁵⁷ Proposal for a directive of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules COM/2018/0185 final. See also Commission Communication, *A New Deal for Consumers* COM(2018) 183 final and Commission Communication, *Completing a Trusted Digital Single Market for all* COM(2018) 320 final.

¹⁵⁸ Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final.

¹⁵⁹ Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM/2015/0635 final. See now the amended Sale of Goods proposal: COM/2017/0637 final. There is further a proposal for a directive on representative actions for the protection of the collective interests of consumers, repealing Directive 2009/22/EC COM/2018/0184 final.

a positive level, the UK legislator may wish to examine whether such changes should be mirrored in English law, notably to avoid increasing transaction costs for businesses which are likely to rise in the face of substantial divergence in cross-border contract law. Further, there has been considerable discussion of the benefits of regulatory equivalence despite Brexit, notably in the field of financial services and goods.¹⁶⁰ For political and economic reasons, therefore, it may not be desirable for UK law to diverge too far from EU practice. This suggests that the question of relevance may differ from sector to sector depending on political, rather than judicial, decision-making. This does little to clarify the operation of s.6(2) bar that it may be context-dependent.

5. Conclusion:

In the *Miller* case the UK Supreme Court held that:

Upon the United Kingdom's withdrawal from the European Union ... those legal rules derived from EU law and transposed into UK law by domestic legislation will have a different status. They will no longer be paramount, but will be open to domestic repeal or amendment in ways that may be inconsistent with EU law.¹⁶¹

The European Union (Withdrawal) Act 2018 makes it clear that, post-Brexit, areas of the private law such as consumer law where EU law has been active will remain unchanged, subject to legislative reversal or amendment or intervention by the Supreme Court. In practice, then, rights transposed from EU law into Part 1 of the Consumer Protection Act 1987 and the Consumer Rights Act 2015 are likely to remain. Precedents influenced by CJEU case-law such as *A v National Blood Authority*,¹⁶² *Director General of Fair Trading v First National Bank*¹⁶³ and *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis*¹⁶⁴ are still binding. Despite the obvious differences between Brexit and the ending of appeals to the Privy Council in Australia in the 1980s, a study of legal practice and citation data does reveal a number of factors which are likely to be influential in determining the extent to which the CJEU case-law will be regarded as relevant and persuasive in the interpretation of EU retained law once the ties with the EU and CJEU have been severed. As we have seen, issues of reputation/respect, historical ties, dialogue and communication and legislative change suggest that future CJEU case-law will have a diminishing persuasive effect. It will require a positive effort by the UK courts to maintain a relationship with the CJEU and to continue to use its judgments to shape its understanding of EU retained law.

Four conclusions may be thus drawn.

First, that **persuasion is not to be taken for granted**. The Australian courts have stressed that they may find UK (and indeed other common law authority) persuasive, but only when it merits

¹⁶⁰ See E. Ferran, 'The UK as a Third Country Actor in EU Financial Services Regulation' (2017) 3 *Journal of Financial Regulation* 40, 64, who notes that the UK's position of equivalence will differ from other 'third' countries in that the question will not be whether the systems have converged sufficiently to be considered equivalent, but whether it remains equivalent in spite of the extent to which its system has started to diverge from the EU approach. See further HM Government, *The Future Relationship between the UK and the EU* (Cmnd 9593, 2018) and https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/recognition-non-eu-financial-frameworks-equivalence-decisions_en (accessed 12 November 2018).

¹⁶¹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 para. 80.

¹⁶² [2001] 3 All ER 289 (but see now *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB); [2018] Q.B. 627 casting doubt on this approach).

¹⁶³ [2001] UKHL 52, [2002] 1 A.C. 481.

¹⁶⁴ [2015] UKSC 67; [2016] A.C. 1172.

such a finding. Above we noted the issue of respect for the body of the court, its style of reasoning and the clarity with which judgments are given. We also noted that historical ties do seem to be a factor, but that this will only operate where ongoing contact and dialogue exists between the jurisdictions in question. Such findings raise a number of interesting questions as to the future interaction of the UK courts and the EU. The legislation places the onus on UK judges to determine the “relevance” of EU law. s.6(2) is merely permissive – it does not place a duty on the courts to refer to such law, but rather allows them to determine when it will be of relevance and says nothing of its persuasive force.

Secondly, **persuasion is likely to diminish with time.** Legislative change will lead to divergence unless the UK seeks to mirror new developments or pursue policies of equivalence. Such moves would be politically controversial, despite the fact that they may reduce transaction costs for businesses and offer consumers a uniform level of protection wherever they shop in Europe (or online). New alliances may also lead to divergence. Smyth, for example, has noted that one of the reasons for falling citation rates of UKSC decisions in Australian law has been UK membership of the European Union, which made English law less relevant to Australia, and the increasing influence in the UK of the European Convention on Human Rights since the introduction of the Human Rights Act 1998 (UK).¹⁶⁵ New trade agreements and alliances may take UK law away from its EU counterparts, which, as noted above, are currently working on a number of key initiatives, notably in the field of consumer law. There is a possibility therefore of the UK operating a “retro”-EU law, whilst its former Member States move on.

Thirdly, case-law is also likely to diverge as **national dictates of policy** may lead to, and indeed encourage, different interpretations and substantive development of the law. The case studies in this paper have been helpful in illustrating that common foundations do not necessarily result in identical application of the rules. Even a statute, identically worded, can lead to divergence. There seems no reason why the same will not happen with EU law. Macmillan argues that this will put under threat measures which arise largely from EU initiatives and do not draw upon a traditional common law basis.¹⁶⁶ We can expect, therefore, a narrow interpretation of measures which do not fit within future national policy initiatives. Indeed, HCA Chief Justice Kiefel recently observed that the abolition of appeals to the Privy Council forced judges to examine whether the law in place was consistent with Australian society in 1986,¹⁶⁷ leaving much to the perception of judges. Will the UK Supreme Court take up the opportunity offered by the 2018 Act to overturn CJEU case-law or, more likely, will reference to such case-law simply diminish in the face of domestic policy initiatives?

A fourth factor which is inevitable is that departure leads to a **rise of nationalism**.¹⁶⁸ Hesselink has noted the nationalist undertone in many technical arguments raised against the

¹⁶⁵ R. Smyth, ‘Citations of Foreign Decisions in Australian State Supreme Courts over the Course of the Twentieth Century: An Empirical Analysis’ (2008) 22 Temple International & Comparative Law Journal 409, 421-2. See also A. Mason, ‘A judicial perspective on the development of common law doctrine in the light of statute law’ in A. Robertson and M. Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart, 2016).

¹⁶⁶ C. Macmillan, ‘The impact of Brexit upon English contract law’ (2016) 27 K.L.J. 420.

¹⁶⁷ S. Kiefel, ‘The adaptability of the common law to change’, speech to the Australasian Institute of Judicial Administration Banco Court, Brisbane, 24 May 2018, 5.

¹⁶⁸ Gellner defines nationalism as “a political principle, which holds that the political and the national unit should be congruent”: E. Gellner, *Nations and Nationalism* (2nd ed., Blackwell Publishing, 2006).

Europeanisation of private law¹⁶⁹ and ensuing national resistance against supranational law.¹⁷⁰ Likewise, it can be seen that the cutting of formal ties with the Privy Council encouraged jurisdictions to develop their “own” law which is particularly suited to localised needs. In such an environment, however good the source may be, there may be a reluctance to be seen to “follow” the path of a previously supreme court when the onus should be on the domestic court to develop new law. This is certainly the views of the most ardent Brexiteers.

Predicting the course of Brexit is not for the unwary. Nevertheless, for a comparative lawyer, faced with uncertainty, one’s first instinct is to find points of reference from systems which have faced similar dilemmas as a means for gaining a clearer picture of the possible responses to change.¹⁷¹ In highlighting factors which indicate when external case-law will be regarded as relevant and having persuasive force, we can gain a clearer idea of the factors likely to influence the operation of section 6. This is not a question which can simply be answered by reading the 2018 Act. If the interpretation of retained EU law is to benefit from the input of decisions of the CJEU and consideration of legislative reforms to the Directives on which the legislation is based, it is clear that much rests on the UK itself maintaining a dialogue and communication with European Union law. This will not simply be a matter for UK judges, but one which should also concern UK academics and practising lawyers.

¹⁶⁹ M. Hesselink, ‘The Case for a Common European Sales Law in an Age of Rising Nationalism’ (2012) 8 E.R.C.L. 342.

¹⁷⁰ This is not confined to the common law: see Gérard Cornu, ‘Un code civil n’est pas un instrument communautaire’, D. 2002, 351.

¹⁷¹ K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998) 43-44; Husa (n 49) 86-89.